Vilter Manufacturing Corporation *and* United Steelworkers of America, Local Union No. 1018, AFL-CIO. Case 30-CA-7277

9 September 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 14 February 1984 Administrative Law Judge William A. Pope II issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent's refusal to reinstate Jon Weber, as directed by an earlier arbitration award in Weber's favor, violated Section 8(a)(1) and (3) of the Act. He also found that the Respondent threatened the Union in violation of those sections of the Act. The Respondent contends that it demonstrated it would have refused Weber reinstatement regardless of any union or protected concerted activities because he fraudulently claimed unemployment compensation. The Respondent further contends that it made no unlawful threat to the Union, but merely indicated there would be hard bargaining at the expiration of the contract. We find merit in these contentions.

On 31 August 1981 the Respondent discharged Jon Weber for failure to comply with a work directive. The Union subsequently filed a grievance concerning Weber's discharge. Pursuant to the parties' collective-bargaining agreement, the grievance was referred to arbitration, and a hearing was conducted on 8 February 1982. Sometime after the hearing, but before the issuance of a decision, the Respondent's manager of human resources, Richard K. Jones, who was in charge of labor relations, told Local Union 1018's recording secretary, Gregory G. Kozerski, that even if the arbitrator ruled in favor of the Union and Weber, the latter "would be terminated for something else, for falsifying company documents." On another occasion, Jones told Kozerski: "[W]hat difference does it make which way the arbitrator rules, the guy's not going back to work anyways." On 9 April 1982 the arbitrator issued his decision directing that Weber's discharge be set aside and that he be reinstated without loss of seniority, but without backpay. The arbitrator concluded that the Respondent had improperly calculated Weber's accumulated penalty point total and therefore in discharging him had misapplied its progressive discipline/penalty point system. On 15 April 1982 the Respondent notified Weber that he would not be reinstated, asserting that he had fraudulently obtained unemployment compensation.

Weber had filed for unemployment compensation benefits on 2 September 1981, shortly after his discharge. Initially, payment of benefits was withheld pending resolution of a challenge which the Respondent made to Weber's eligibility. While the question of his entitlement was being determined, however, Weber continued to file weekly unemployment benefits claim forms. It is undisputed that the claim forms which Weber completed, signed, and submitted to the Job Service Division of the State of Wisconsin's Department of Industry, Labor and Human Relations for the 4-week period from 13 September 1981 through 10 October 1981 were, in whole or in part, false. In particular, on the claim forms in question Weber either falsely reported that he was unemployed or, in the case of one form, misrepresented the amount he was being paid.

Sometime in late November 1981, shortly after the Job Service Division determined that Weber was entitled to receive benefits, the Division questioned the validity of Weber's claim for benefits for the 4-week period. In early December 1981, a "hold," suspending payment of benefits, was placed on his account. On 16 February 1982 the Job Service Division mailed Weber a copy of its form UC-26, entitled "Initial Determination of Benefit Eligibility." The form stated that because Weber had in fact received gross wages equaling or exceeding the weekly benefit rate during the weeks of 19 September 1981, 26 September 1981, 3 October 1981, and 10 October 1981, he had been overpaid $572 in benefits. On 19 February 1982, by its form UC-315, the Division notified Weber that it was withholding benefits for the 4-week period from 5 December 1981 through 26 December 1981 to satisfy the requirement that he compensate the Division for the earlier overpayment.

On 17 February 1982 the Respondent received a copy of the Division's form UC-26 and thus became aware of the overpayment to Weber. By letters of 1 March 1982 and 3 March 1982, Manager of Human Resources Jones gave Weber until 5 March 1982 to prove that he had repaid the overpayment and, as demanded by the second letter, to inform the Respondent of the name of his employer during the 4-week period in September and Octo-

ber 1981. Weber apparently did nothing to comply with the Respondent's 5 March deadline. It is apparent, however, that by at least 12 March 1982 the Respondent had obtained a copy of Job Service Division form UC-315, and thus knew that the $572 overpayment to Weber had been repaid.

On 15 April 1982, after the arbitrator had ordered Weber's reinstatement, Jones sent another letter to Weber informing him that he would not be reinstated. Jones stated that Weber's false statements to the Job Service Division were "not only fraud on that agency, but upon Vilter Manufacturing Corporation whose account may be penalized based upon an adverse impact upon its experience rating." The letter further informed Weber that the Respondent considered his conduct "a violation of the Company's Type D Rules, specifically those dealing with falsification of employment records as well as theft or fraud relating to the Company."

Three days after the arbitrator's decision issued, the Respondent was ordered to pay 15-percent increased workmen's compensation in connection with an on-the-job injury suffered by Weber on 11 July 1979. Weber secured the ruling for increased compensation through an attorney to whom he was referred by the Union.

Several months after the arbitrator's decision, the Respondent sought midterm contract concessions for economic reasons. The Union refused to agree to midterm changes. Shortly thereafter, Jones made a remark to the effect that if the Union wanted a war it would get it.

The judge found that Weber knowingly and willfully falsified four unemployment compensation claims. He nevertheless concluded that the Respondent's refusal to reinstate Weber was a violation of Section 8(a)(3) and (1) of the Act. He concluded that the General Counsel established a prima facie case of improper motivation through circumstantial evidence which demonstrated a connection between the Respondent's refusal to reinstate Weber and Weber's protected activities, including his use of the grievance and arbitration procedures.[1] In particular, the judge relied on the comments made by Manager of Human Resources Jones, that the Respondent would not reinstate Weber, and that he would be terminated for something else, as evidence that the Respondent did not act in good faith with respect to the arbitration process and had, in fact, rejected the process in advance of the arbitrator's decision. The judge also found that a remark made by Jones several months after the arbitrator's award and after learning of the employees' rejection of midterm contract concessions which the Respondent had proposed, to the effect that if the Union wanted war, it would get it, was clear evidence of union animus. The judge reasoned that whatever circumstances prompted the Respondent to seek concessions in August 1982 existed in April 1982, when it refused to reinstate Weber, and that refusing to reinstate Weber would weaken the Union's influence over the employees and thus strengthen the Respondent's position in its August 1982 negotiations with the Union. He further stated that Jones' "war" remark characterized the Respondent's view of its relations with the Union during the period relevant to the Respondent's refusal to reinstate Weber.

Having found that the General Counsel established a prima facie case, the judge addressed the Respondent's defense that it refused to reinstate Weber because he falsely claimed unemployment compensation benefits to which he was not entitled. The judge concluded that the Respondent had failed to demonstrate that it would have refused to reinstate Weber even absent his protected activities. In reaching this conclusion the judge relied on four factors.

First, in his 15 April 1982 letter to Weber, Jones asserted that as a result of Weber's overpayment the Respondent's account with the Job Service Division "may be penalized based upon an adverse impact upon its experience rating." Jones knew, however, that the Respondent's unemployment account had been made whole in February 1982 and understood that the Respondent would not be penalized financially. Second, Jones' letter noted that Weber had not provided the name of his employer during the period he claimed he was unemployed, despite the Respondent's demand for that information in its 3 March 1982 letter. Noting that Jones had made no mention of any such requirement in his 1 March 1982 letter or in telephone conversations with Weber and that once the overpayment had been repaid there was nothing left for the Respondent to do in establishing the overpayment or the reasons for it, the judge characterized the requested information as irrelevant and neither wanted nor needed by the Respondent. Third, the judge asserted that the Respondent's charge that Weber had violated a "D" type rule by falsifying employment records was no more than a red herring because Weber was not an employee at the time he submitted the claim forms and did not falsify any records belonging to or submitted to the

[1] Although the judge refers to Weber's filing of a workmen's compensation claim and his filing, with union assistance, for increased compensation, as protected activity under Sec. 7 of the Act, he principally relies on Weber's use of the grievance and arbitration procedure as the protected activity which motivated the Respondent to refuse to reinstate Weber. In these circumstances we find it unnecessary to assess the impact of *Meyers Industries*, 268 NLRB 493 (1984), on the finding that Weber's filing of a workman's compensation claim and a claim for increased compensation was protected by the Act.

Respondent. Finally, the judge concluded that the penalty imposed on Weber was disproportionate to that which the Respondent had imposed on other employees for similar alleged misconduct.

We disagree with the judge's finding of a violation in this case. Initially, we do not agree that the remarks made by Manager of Human Resources Jones evidence a lack of good faith on the part of the Respondent with respect to the arbitration process. The Respondent was aware of the overpayment to Weber on 17 February 1982, only 9 days after the arbitration hearing. The record does not show the exact date of Jones' comments to Union Recording Secretary Kozerski that Weber would not be reinstated even if the arbitrator ruled in his favor. Given the Respondent's knowledge of Weber's false unemployment claim within a few days of the arbitration, however, it is as probable that Jones' remarks showed a concern for the unemployment fraud, as that they showed a disregard for the arbitration process. In these circumstances, we cannot find Jones' comments constitute sufficient evidence of unlawful conduct. Further, according to the testimony of Union President Ziegler, the third Jones remark on which the judge relied, his statement that Weber was "just bad news," was made after the arbitrator issued his decision, not prior to that award as the judge found, and thus does not support the judge's conclusion that the Respondent had rejected the arbitration process in advance.

Nor do we agree with the judge's conclusion that Jones' comment to the effect that if the Union wanted war, it would get it, made during August 1982, is evidence of an antiunion motive for refusing to reinstate Weber some 4 months earlier. There is simply no evidence in the record to support the judge's assertion that whatever circumstances prompted the Respondent to seek wage concessions in August 1982 existed at the time of the refusal to reinstate Weber. The judge's conclusions that the Respondent refused to reinstate Weber in order to weaken the Union's influence and strengthen its own position in negotiations on a concessions proposal it had not yet even made is too speculative to support a finding of improper motivation.

With respect to the Respondent's defense, contrary to the judge, we do not find that the Respondent's 15 April letter to Weber is an "artfully" drafted coverup of the Respondent's motive. The judge noted that, although the 15 April letter, which informed Weber that he would not be reinstated, charged that his conduct violated the Respondent's D type rule dealing with falsification of records, Weber was not an employee at the time he submitted his claims to the Job Service Division and did not falsify any record which belonged to or was submitted to the Respondent. The judge found the reference to the D type rule was a red herring used to divert attention from the Respondent's true motive. However, the record indicates that on at least one previous occasion, in the case of employee Marvel Tyler, which was described as identical to that of Weber, the Respondent interpreted its D type rule consistent with the interpretation reflected in the 15 April letter to Weber and disciplined an employee who submitted false information to the Job Service Division during a period in which he was not employed by the Respondent. Moreover, the letter states that the Respondent considered Weber's conduct a violation of the D type rule dealing with "theft or fraud relating to the Company." There is, therefore, nothing deliberately confusing or diversionary about the Respondent's reference to the rule in its letter to Weber.

Finally, we do not agree with the judge's conclusion that the Respondent's treatment of Weber was disproportionate to its treatment of others who obtained unemployment benefits by fraud. It is true that the Respondent had not previously discharged an employee solely because the employee engaged in conduct similar to that of Weber. The Respondent, however, has a progressive discipline/penalty point system which, as interpreted by the arbitrator's 9 April award, provides that an employee who has accumulated 14 penalty points over a period of 12 consecutive months will normally be discharged. While there is no indication that any of the other employees who engaged in conduct similar to Weber's had previously accumulated penalty points, it is clear from the arbitrator's 9 April decision that Weber had 12 accumulated penalty points at the time he submitted false information to the Job Service Division.[2] The record demonstrates that the Respondent had imposed eight penalty points (the minimum assessed for a D type rule violation) and a 1-week layoff on employee Marvel Tyler under circumstances which, as noted above, were described as identical to those in the case of Weber. The Respondent's refusal to reinstate Weber, who had an accumulated penalty point total only two points shy of that normally resulting in dismissal at the time he engaged in conduct identical to that which had previously resulted in the

[2] It was the accumulation of these points which led the arbitrator to deny backpay: "The arbitrator, however, is persuaded not to award the grievant backpay primarily for the reason that grievant has demonstrated and accumulated a regular and consistent series of rule violations throughout his total employment period and further because the grievant clearly could have been terminated at an even earlier date had the Company not chosen to exercise leniency in several cases where the grievant had violated rules."

assessment of eight penalty points, was thus not disproportionate to its treatment of others who fraudulently had obtained unemployment benefits. Contrary to the judge's assertion, the record does not, therefore, support a finding of disparate treatment.

Our evaluation of the evidence leaves intact only two factors relied on by the judge: that the Respondent's 15 April letter to Weber mentioned a possible penalty against the Respondent at a time when the Respondent knew it would not be penalized and that the 15 April letter chastized Weber for not providing the name of his employer during the period he claimed unemployment even though the Respondent had no need for the information once the overpayment had been repaid. The Respondent asserts that by its reference to a possible penalty it simply intended to stress the magnitude of Weber's misconduct. The statement concerning Weber's failure to supply the name of his employer might well be interpreted in the same way. Certainly these two factors, standing alone, are not sufficient to sustain the finding of a violation, particularly when considered against Weber's past record, the degree of fraud he attempted to commit, and the absence of evidence that he received disparate treatment from the Respondent. Accordingly, we find that the Respondent has established that it would have refused reinstatement to Weber even in the absence of his protected activities. We shall therefore dismiss that allegation of the complaint.

We shall also reverse the judge's finding that Jones' comment after learning of the employees' rejection of a midcontract wage concession proposal, to the effect that if the Union wanted war, it would get it, amounted to a threat to retaliate against the Union because it had filed an unfair labor practice charge. We agree with the Respondent that Jones' remark is more properly characterized as a claim that the Union could anticipate hard bargaining once the collective-bargaining agreement expired. In the absence of any other unfair labor practices or any evidence of animus toward the Union, we find that Jones' remark did not amount to a threat in violation of Section 8(a)(1) and (3). Accordingly, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

DECISION

STATEMENT OF THE CASE

WILLIAM A. POPE II, Administrative Law Judge. In a complaint issued on September 30, 1982, and amended on January 19, 1983, the Regional Director for Region 30, National Labor Relations Board, Milwaukee, Wisconsin, alleged that Respondent, Vilter Manufacturing Corporation, engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act by refusing to reinstate an employee pursuant to an arbitration award and threatening to retaliate against the Union because the Union had filed an unfair labor practice charge. The charge in this case was filed on August 10, 1982, by Local 1018 of the United Steelworkers of America. Trial was held on February 3 and 4, 1983, in Milwaukee, Wisconsin, before Administrative Law Judge William A. Pope II.

FINDINGS OF FACT

I. BACKGROUND

The Respondent, Vilter Manufacturing Corporation, is a Wisconsin corporation engaged in the manufacture of commercial refrigeration and air-conditioning equipment at plants located in Milwaukee, Wisconsin. Local Union 1018, United Steelworkers of America (the Union), has been the exclusive representative of the Respondent's production and maintenance employees since before 1940. At the time of hearing, the Respondent employed approximately 321 persons, of whom 80 to 90 were members of the bargaining unit.

On August 31, 1981, the Respondent terminated one of its employees, Jon Weber, allegedly because he failed to comply with a work directive. A grievance filed by the Union over Weber's discharge was denied by the Respondent, and then referred to arbitration, on February 8, 1982, pursuant to a collective-bargaining agreement between the Union and the Respondent. On April 9, 1982, the arbitrator issued his decision directing that Weber's termination be set aside, and that he be reinstated within 10 days, without loss of seniority, but without backpay. However, by letter, dated April 15, 1982, Richard K. Jones, Respondent's manager of human resources, notified Weber that he would not be reinstated, because allegedly he had fraudulently obtained unemployment compensation. On April 21, 1982, the Union filed a grievance over the Respondent's refusal to reinstate Weber. The grievance was denied by the Respondent. The Union did not seek arbitration, but, instead, subsequently filed the unfair labor practice charge in this case.

After being discharged, Weber first filed for unemployment compensation benefits on September 2, 1981. The Respondent, however, challenged Weber's entitlement to benefits, and, on October 5, 1981, the Job Service Division of the State of Wisconsin's Department of Industry, Labor and Human Relations made an initial determination that Weber had been discharged for misconduct connected with his employment, and denied him unemployment benefits. That initial determination was subsequently reversed by the Job Service Division's Appeal Tribunal, which, after a hearing on November 10, 1981, issued a decision on November 12, 1981, finding that Weber was eligible to receive benefits if otherwise qualified. Although there is a provision for appeal of decisions by the Appeal Tribunal, the pertinent Wisconsin statute specifically provides that benefits will not

be withheld pending expiration of the appeal period or if an appeal is filed. In any event, there is nothing in this record indicating that an appeal was filed to the decision of the Appeal Tribunal in Weber's case.

While the question of his eligibility was being determined, Weber continued to file weekly unemployment benefits claim forms with the Job Service Division, but payment of benefits was withheld pending resolution of the challenge to his eligibility. Among the questions asked on the UC-17E claim forms filed with the Job Service Division by Weber, at least during the period relevant in this case, were whether the applicant did any work during the week, whether he was then working, either full or part-time, and if he had worked or was working, his wages before deductions, and his employer's name and address. Above the space on the form for the applicant's signature is a written certification attesting that all questions have been answered correctly and that the applicant knows that the law provides penalties for false statements to obtain benefits.

It is uncontroverted that Weber was, in fact, employed during the 4-week period from September 13, 1981, through October 10, 1981, and the UC-17E claim forms for that period which he filled out, signed, and submitted to the Job Service Division were false, in whole or in part, with respect to his employment or wages. During the 4-week period, Weber was employed as a handyman by Archie Meinez, owner of Echo Lake farms, at a weekly wage of $280, payable, according to Weber, regardless of how many hours he actually worked.[1]

On the UC-17E form covering the week of September 13, 1981,[2] Weber disclosed his employment by Meinez, but listed wages of only $47.66. On the first of two UC-17E forms which he filed for the week of September 20, 1981, Weber listed Meinez as his employer, but entered a question mark in the space for wages. According to Weber, when that form was returned to him by Job Service Division with the question mark circled in red, he filled out and submitted another UC-17E form for the same week upon which he answered that he was not then employed and had not worked during the week. He left the spaces for wages, employer's name, and employer's address blank.[3] The UC-17E forms which Weber filed out, signed, and filed for the next 2 weeks, the weeks of September 27, 1981, and October 4, 1981, state that he was not then working and had not worked during either week and contain no entry in the spaces for wages, employer's name, and employer's address.

It appears that the Job Service Division first questioned the validity of Weber's claim for employment benefits for the 4-week period sometime in late November 1981, and at some point in early December 1981 a "hold," suspending payment of benefits, was placed on his account. Although there is no direct evidence as to when the "hold" was placed, a representative of Job Service Division testified that Weber's last benefit claim payment in 1981 was on December 4, 1981. Copies of the UC-17E forms submitted by Weber for weeks 38, 40, and 41[4] were obtained by the Job Service Division unit responsible for adjudicating questioned claims on December 11, 1981. On January 18, 1982, Weber appeared at the offices of the Job Service Division, where he gave a written statement, explaining his reasons for the manner in which he had filled out the three forms. Weber apparently did not contest Job Service Division's finding, reflected on Job Service Division form UC-26, mailed to Weber about February 16, 1982, that he was not entitled to unemployment benefits for the 4-week period and that he had been overpaid $572, which he had to repay. By form UC-315, mailed on February 19, 1982, Job Service Division notified Weber that it was withholding unemployment benefits for the 4-week period from December 5, 1981, through December 26, 1981, to satisfy the requirement that he forfeit unemployment benefits to compensate for the earlier overpayment of $572.

The Respondent became aware on February 17, 1982, of the overpayment of unemployment benefits to Weber when it received a copy of Job Service Division form UC-26, entitled "Initial Determination of Benefit Eligibility,"[5] stating that Weber had been overpaid $572, because he had gross wages equaling or exceeding the weekly benefit rate during the weeks of September 19, 1981; September 26, 1981; October 3, 1981; and October 10, 1981. By letters of March 1, 1982, and March 3, 1982, addressed to Weber, Richard K. Jones, the Respondent's manager of human resources, gave Weber until March 5, 1982, to prove that he paid back the overpayment to Job Service Division, and, as demanded in the second letter, to disclose who his employer had been during the 4-week period in September and October 1981. Although, it appears, Weber did nothing to comply with the March 5, 1982 deadline imposed by Jones, the matter of the overpayment was raised during the March 8, 1982 hearing on Weber's claim for 15 percent increased workman's compensation, in which the Respondent participated, and, by letter of March 12, 1982, the Respondent's attorney in that proceeding, Nonald J. Lewis, transmitted to the hearing examiner a copy of Job Service Division form "UC-315," showing that the $572 unemployment benefit overpayment to Weber had been repaid.[6]

[1] Weber's wages were not paid on a timely basis though, and on October 26, 1981, the Equal Rights Division of the State of Wisconsin's Department of Industry, Labor, and Human Relations, sent a "Notice of Wage Claimed Filed" to Echo Lake Farms, stating that Weber claimed unpaid wages in September 1981 for 2 weeks at $280 per week. It appears that eventually Weber was successful in obtaining payment of the wages owed to him by Echo Lake Farms.

[2] The calendar week of September 13, 1981, through September 19, 1981, was designated as week "38" by the Job Service Division.

[3] At the time of trial, the UC-17E form which Weber filed for that week, designated as week "39" by Job Service Division, was missing from Job Service Division's files.

[4] Numbers assigned by Job Service Division to the weeks of September 13, 1981; September 21, 1981; and, October 4, 1981. Apparently the UC-17E form for the week of September 20, 1981 (week "39") was missing from Job Service Division's files at that time.

[5] Richard K. Jones, the Respondent's manager of human relations, spoke to Weber by telephone on February 17, 1982, concerning the UC-26 form and asked Weber's intentions with regard to repaying the $572 overpayment. At that time, however, Weber had not yet received his copy of the UC-26 form.

[6] According to Attorney Lewis, the form "clearly and unequivocally demonstrates the truth of Vilter's position, that Mr. Weber did in fact owe $572, as a result of an attempt to take benefits from the Vilter account when he was not entitled thereto."

By at least March 12, 1982, therefore, the Respondent knew that Weber's overpayment had been repaid.

Subsequently, on April 15, 1982, after the arbitrator had ordered Weber's reinstatement, Jones sent another letter to Weber stating that Weber would not be reinstated to his employment because he had committed fraud upon the Job Service Division and "upon Vilter Manufacturing Corporation whose account may be penalized based upon an adverse impact upon its experience rating."[7] As already noted, a grievance was filed by the Union on Weber's behalf on April 21, 1982. It quickly moved to the fifth step of the grievance procedure and was taken up on April 28, 1982, at a meeting attended by Weber, and various union and company representatives, including Jones. At the fifth step grievance meeting, the Union presented a copy of the UC-315 form showing that the overpayment to Weber had been repaid. It is not disputed that at the fifth step grievance meeting, the Respondent's attorney asked the Union to obtain copies of the claim forms for the 4 weeks in question, which, he said, the Company would take into consideration. Because of difficulties in obtaining copies of the forms from the Job Service Division, which initially refused to release them (copies of the claim forms were available for only 3 of the 4 weeks, the claim form submitted by Weber for the week of September 20, 1981, being missing from Job Service Division's files), copies of the forms had not been provided to the Company by May 6, 1982,[8] when the Company prepared a letter to the Union, stating that it had denied Weber's grievance. It was not until June 3, 1982, that Job Service Division notified the Respondent's attorney, Barton M. Peck, that the forms for weeks 38, 40, and 41 would be mailed directly to Weber.

Also having a bearing on this case is a sequence of events following an on-the-job injury to his right hand suffered by Weber on July 11, 1979. While recovering from the injury, Weber remained off work unti September 22, 1980, during which period of time he intermittently drew temporary total disability benefits. On August 6, 1981, Weber, through his attorney, to whom he was referred by the Union, filed for 15 percent increased compensation under Wisconsin law, based on an alleged failure of the Respondent to furnish a safe place of employment. A hearing on this matter was held in Milwaukee, Wisconsin, on March 8, 1982. By interlocutory order, dated April 12, 1982, the hearing examiner ordered the Respondent to pay 15-percent increased compensation to Weber and to pay his attorney's fee.

[7] Respondent's UC Reserve Account, to which Jones referred, actually was restored upon Job Service Division's determination in February 1982 that Weber had been overpaid. Hence, there was no possibility that Vilter's account would be penalized.

[8] The Respondent's attorney sent a letter to Job Service Division on April 29, 1982, stating that Weber was legally entitled to obtain copies of the forms. The letter also stated that "Mr. Weber denies any wrongdoing and relies on representations he claims he had made on the above documents (UC-17E claim forms). The Company has agreed to consider the contents of these claim forms as a basis for reevaluating its action, provided that the Company is satisfied that he did not engage in the claimed misconduct."

II. ISSUES

There are two broad issues in this case:[9] (1) Did the Respondent violate Section 8(a)(1) and (3) of the Act by discriminatorily refusing to reinstate Weber pursuant to the arbitrator's award, in retaliation for Weber's successful prosecution, with union assistance, of his grievance over his discharge, and his filing a claim for 15-percent increased workman's compensation as the result of a hand injury which he sustained while working for the Respondent; and (2) did the Respondent violate Section 8(a)(1) and (3) of the Act by threatening to retaliate against the Union because it filed the unfair labor practice charge in this case or because the Union refused to grant to the Respondent midterm contract concessions.

Counsel for the General Counsel argues that the Respondent was motivated by antiunion animus when it refused to reinstate Weber pursuant to the arbitrator's award, and that its claim that it refused reinstatement because Weber had committed fraud against the Company and the State of Wisconsin by fraudulently claiming and receiving unemployment compensation benefits, was, in fact, a mere pretext. According to the General Counsel, Weber lacked the specific intent to commit fraud; he filed false unemployment compensation claims for a 4-week period only for the purpose of keeping his claim open, and not for the purpose of obtaining money to which he was not entitled. The Respondent's true motives are revealed, according to the General Counsel, by its refusal to listen to or accept Weber's explanation for his actions, and by the disproportionate punishment imposed upon Weber in comparison to that imposed upon other employees who obtained unemployment compensation benefits to which they were not entitled. Finally, asserts the General Counsel, the Respondent admits that Richard K. Jones, its human resources manager, threatened to wage war on the Union, as alleged in the complaint. The only questions remaining, argues the General Counsel, are the date of the threat and the context in which it was made. It makes no difference, says the General Counsel, whether the threat was made against the Union because of the grievance filed on behalf of Weber, or because the Union refused to agree to midterm contract concessions requested by the Respondent. In either event, concludes the General Counsel, the threat constituted a violation of Section 8(a)(1) of the Act.

The Respondent, for its part, argues that it did not violate the Act by refusing to reinstate Weber, because Weber knowingly falsely claimed unemployment compensation benefits to which he was not entitled, and, therefore, engaged in a scheme to defraud both the Respondent and the State of Wisconsin. It is well established, contends the Respondent, that an employee who engages in a scheme to defraud his employer of unemployment compensation benefits should not be reinstated.

[9] The issue of deferral to arbitration does not arise with regard to the unfair labor practice charge that the Respondent failed to comply with the arbitrator's award ordering reinstatement. The question here is whether by its conduct the Respondent, in effect, rejected the principles of collective bargaining when it refused to honor the arbitration award. The Board has indicated that deferral to arbitration is not appropriate in such cases. *United Technologies Corp.*, 268 NLRB 557 (1984).

The Respondent argues that there is simply no evidence to support the General Counsel's claim that it refused to reinstate Weber because he had engaged in activities protected under the Act. The Respondent contends that it has historically challenged this very form of misconduct by invoking appropriate discipline. The Respondent asserts that Weber did not act out of impulse, but on four different occasions certified that information which he submitted in order to obtain unemployment benefits was truthful, when in fact it was false. The Respondent notes that even the arbitrator found that it had been tolerant in the past by not discharging Weber earlier upon his record of persistent errant behavior. The only feasible action to be invoked, says the Respondent, upon disclosure of Weber's unemployment compensation fraud, was his termination. Relying upon what it considers to be the law of the case, the Respondent concludes that where, as here, an employer demonstrates a good ground for discharge of an employee apart from union animus or union activity, the Board must find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. In this case there has been no such showing.

III. FINDINGS AND CONCLUSIONS

There is no dispute that the unemployment benefits claim forms which Weber filled out and filed with the State of Wisconsin for the 4-week period beginning about September 13, 1981, contained material falsehoods. On the claim form for the first of the 4 weeks, Weber substantially understated his earnings from other employment. On the claim forms for each of the following 3 weeks, he falsely stated that he was unemployed and had no earnings, when, in fact, the opposite was true. But, while admitting the fact that the claim forms which he filled out, signed, and submitted to the State of Wisconsin were false, at least with regard to his employment and earnings, Weber contends that he had no intent to defraud or to obtain money under false pretenses. Instead, he asserts, he was afraid that if he disclosed his interim employment and earnings, his claim for unemployment benefits based on being wrongfully fired by the Respondent would have been closed, and, to avoid that, he concluded it would be better not to disclose the true facts concerning his interim employment and earnings, and "to let everything run its course and that it would be straightened out in due time." I find this explanation to be unbelievable.

At trial, Weber sought to portray himself as a person of limited education and understanding, who acted out of ignorance rather than bad intent. Among other things, Weber testified, no one had explained to him that the filing of claim forms would result in payment of benefits, and, in fact, he did not receive any benefits until early 1982. Further, he did not understand some of the words on the claim forms (such as the meaning of the words or phrases "calendar week," "certification," "penalties," and "Federal Subsistence Allowance for vocational rehabilitation"). In any event, he said, he merely copied from an old form when filling out some of the false claim forms, without actually reading either form. Thus, contends Weber, he may have been mistaken in what he did, but his intention was only to keep his claim alive until he could clear his discharge record.

I find, however, that Weber's attempt at self-denigration is not only unsupported by, but is contrary to, the record. In fact, I find that he is an alert individual, who is aware of his surroundings, and quite capable of functioning adequately in the conduct of his day-to-day affairs. He is a high school graduate and has completed several courses at the college level. While that, alone, of course, does not guarantee literacy, it makes implausible his claim that he could not read or understand writing well enough to realize that by filing a paper entitled "Claim For Wisconsin Unemployment Benefits" he was applying for payment of money. Indeed, if not to obtain money, one wonders just why he submitted any of the forms, which covered a much longer period than the 4 weeks in question here. Weber's contention that he did not read some of the forms as he filled them out, by copying from other forms which he had filled out earlier, appears to be an attempt to excuse his actions by raising the additional defense that the falsification of some of the forms was inadvertent. Not only is such a defense fatally inconsistent with his basic defense that he supplied false information only to keep his claim alive, it also is implausible, as well. The questions to which he supplied false answers or failed to provide answers (for example, "Did you work in that week?") were simple and direct, permitting no reasonable doubt concerning the information requested, and they were short in length, making it unbelievable that he would forget from one week to the next what information was being requested, or, even, that he could copy answers to the questions without, at the same time, reading the questions he was answering.

Viewed from a different perspective, Weber's actions in relation to his employer, the Respondent, over a period of several years consistently reflected his desire to vindicate himself and a perceptive awareness on his part of his options in securing for himself every available advantage. Beginning with the injury to his hand, Weber availed himself of his right to workmen's compensation, and, subsequently, was successful in obtaining 15-percent increased compensation as a penalty for the Respondent's violation of Wisconsin law by failing to maintain a safe workplace, a procedure which not only involved filing an application, but an adversary hearing, as well. Then, on being discharged from his job by the Respondent, Weber exercised his grievance rights, applied for, and obtained, over the Respondent's objections, unemployment benefits, participated in an arbitration proceeding which involved a hearing at which he testified, and participated in another grievance proceeding after being refused reinstatement by the Respondent.

Considering all of these facts, I find that Jon Weber fully understood and appreciated the nature and consequences of his actions, and that his filing of the false unemployment benefits application forms was a deliberate and conscious act intended to withhold pertinent information from the State of Wisconsin, which he felt might adversely affect his entitlement to unemployment benefits, in order to win a favorable ruling on the question of his eligibility to win benefits. While it may be that

Weber's primary motive for falsifying the four application forms in question was to make sure that earnings from interim employment would not prevent him from receiving a hearing on his entitlement to unemployment benefits based on being fired by the Respondent, I do not believe his claim that he always intended at some later time to disclose the true facts concerning his interim employment. More accurately, I find that he intended to disclose the true facts only if his claim for benefits for the 4-week period was ever questioned.

Although Weber professes that his main objective was to get a hearing on the initial denial of unemployment benefits, when he actually received that hearing in November 1981, he made no disclosure of his falsification of four false unemployment benefits claim forms which he had filed. Indeed, he said nothing on the subject until the Wisconsin Job Service Division discovered irregularities in the claim forms, put a hold on further payment of benefits in December 1981, and called Weber in for an interview. It was only upon being confronted that Weber disclosed that he had falsified the 4 weekly claim forms. Further, although Weber testified that he never received any payment of benefits for the 4 weeks in question, I find that he did. A representative of the Wisconsin Job Service Division testified that all back checks, including those, for the 4 weeks in question, were released when the Appeal Tribunal decided on November 12, 1981, that Weber was eligible to receive unemployment benefits. A further hold was not placed on Weber's account by Job Service Division until sometime in December 1981, and, when restitution was subsequently made by Weber for the overpayment for the 4 weeks of ineligibility, it was by forfeiture of 4 weekly benefit checks for the month of December 1981, which had been withheld by Job Service Division.

Based on all of the foregoing, I conclude that Weber knowingly and willfully falsified the four claim forms in question, that he knew that if his eligibility was upheld he would receive payment of benefits for those 4 weeks, that he was paid unemployment benefits for those 4 weeks, and that he had no intention of disclosing the falsification of information or of declining to accept or return any benefit payments which he might receive for the 4-week period, unless the falsification of the claim was discovered.

Under appropriate circumstances, an employee's willful failure to report his earnings for the purpose of obtaining unemployment benefits to which he was not entitled might, as argued by the Respondent, constitute grounds for the employer to terminate the employee's employment, or, as in this case, not to reinstate his employment, as ordered by an arbitrator. See *NLRB v. Mutual Maintenance Service Co.*, 632 F.2d 1380 (8th Cir. 1980). Counsel for the General Counsel, however, argues that the Respondent, in refusing to reinstate Weber, was actually motivated by union animus and a desire to rid itself of Weber because of his union and protected activities. Thus, concludes counsel for the General Counsel, the cases cited by the Respondent in an effort to justify its refusal to reinstate Weber are inapposite. I agree.

The procedure for deciding so-called mixed motive cases was set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under this procedure, the General Counsel has the burden of proving that the employee's protected conduct was a motivating factor in his discharge, or, its equivalent in this case, the employer's refusal to reinstate a discharged employee as ordered by an arbitrator to whom the issue of discharge was referred for binding arbitration under a collective-bargaining agreement. If the General Counsel meets this burden, the employer can avoid being held guilty of an unfair labor practice by proving by a preponderance of the evidence that there was a business justification for the firing, or refusing of reinstatement, and the employee would have been discharged or refused reinstatement in any event.

In this case, I find that counsel for the General Counsel has met her burden of proving that union animus and Weber's protected conduct were motivating factors in the Respondent's refusal to reinstate his employment, and that the Respondent has failed to prove by a preponderance of the evidence that there was either a business justification for its decision or that Weber would have been discharged (or refused reinstatement) in any event. Accordingly, I find that the Respondent's refusal to reinstate Weber's employment, as ordered by the arbitrator, was an unfair labor practice, in violation of Section 8(a)(1) and (3) of the Act.

There is no doubt that Weber's utilization of the grievance and arbitration procedures contained in the collective-bargaining agreement, and his reliance on the Union's assistance were protected activities under Section 7 of the Act. Similarly protected were his actions in filing a workmen's compensation claim following the on-the-job injury to his hand, and, subsequently, with some union assistance, in filing for 15-percent increased compensation because of an alleged violation by the Respondent of a Wisconsin statute requiring it to maintain a safe workplace. The only remaining question of any substance here is whether Weber's protected activities had anything to do with the Respondent's refusal to comply with the arbitration award. I find that there is evidence of such a connection.

As pointed out by the United States Court of Appeals for the Seventh Circuit in *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980), motive is a mental attitude which may be proved by circumstantial as well as direct evidence. One item of circumstantial evidence which the court regarded as particularly important, especially since it was missing in that case, was a showing of disproportionate treatment of employees.

As might be expected, there is little direct evidence of the Respondent's motives for refusing to reinstate Weber. There is, however, a chain of circumstantial evidence which quite clearly satisfies the General Counsel's burden of proving that union animus and Weber's protected activities were motivating factors in the Respondent's refusal to reinstate him to his former position, as ordered by the arbitrator.

Strongly suggestive of improper motivation is the fact that the Respondent did not act in good faith with respect to the arbitration process. Indeed, the Respondent

clearly had no intention of reinstating Weber, regardless of the outcome of the arbitration proceeding, as demonstrated by a series of remarks made after the arbitration hearing, but before the arbitrator's decision, by Richard K. Jones, the Respondent's manager of human resources, who was in charge of labor relations for the Company. As testified by Robert Ziegler, Local Union 1018's president, he was told by Jones that "[t]here is no way we're going to reinstate him [Weber]. He's just bad news and we don't want him around here." On another occasion, as related by Gregory G. Kozerski, Local Union 1018's recording secretary, Jones said that even if the arbitrator ruled in favor of the Union and Weber, the latter "would be terminated for something else, for falsifying company documents." On another occasion, Jones told Kozerski that "what difference does it make which way the arbitrator rules, the guy's not going to be back to work anyways."

In the context in which it occurred, I find that the Respondent's rejection in advance of the arbitration process is evidence that it was motivated by a desire to punish Weber and the Union for taking the case to arbitration, and to reduce the influence and position of the Union by showing that it was powerless to intercede effectively on behalf of the employees. The remarks by Jones indicate that he was looking for a pretext for rejecting the arbitration process, and found one in the unemployment compensation overpayment incident. This conclusion is embodied in his remark that "[h]e's just bad news and we don't want him around here," the plain implication of which is that Weber was an irritant and troublemaker. The conclusion is further supported by the fact that at the same time the Respondent, through Jones, was telling union officials that Weber would not be reinstated under any circumstances, Jones was asking Weber to provide proof of repayment of the overpayment of unemployment compensation (which had, in fact, been made by February 19, 1982) and creating the impression repayment would end the matter, as, indeed, it had in similar cases.

The Respondent's antiunion motive for refusing to reinstate Weber is corroborated by a remark made by Richard K. Jones several months after the arbitrator's decision, to the effect that if the Union wanted a war, it would get it. There is no dispute that Jones made such a remark, in substance; the only dispute is whether he made it with reference to the Weber case, as claimed by the union witnesses, or with respect to the refusal of the Union and bargaining unit members in August 1982, to grant midterm contract concessions requested by the Respondent, as claimed by Jones. I find the distinction to be one without difference since, in either context, the remark amounted to an explicit illegal threat to retaliate against the Union because it had engaged in lawful actions which displeased the Respondent. One of the primary purposes of the National Labor Relations Act as stated in Section 1(b), is "to provide peaceful and orderly procedures for preventing the interference by either [employees and employers] with the legitimate rights of the other." For the employer in this case to threaten the Union with warfare, with all that implies, is obviously alien to the purposes of the Act and amounts to an unfair labor practice, in and of itself. But, equally significantly, it sums up the Respondent's attitude toward the Union during 1982. For economic reasons, which the Respondent apparently considered compelling, and which must have existed long before the actual request for concessions was made, it wanted midterm contract concessions and it was determined to get them whether the Union agreed or not. The "war" remarks quite clearly show that the Respondent thought the Union was blocking the way. There could hardly be clearer evidence of union animus.

Whatever circumstances prompted the Respondent to seek the midterm contract concessions in August 1982 doubtless existed in April 1982, when it refused reinstatement to Weber. The Company wanted concessions, and to get them it was obviously to the Company's advantage that the Union's influence over the employees be weakened. To accept reinstatement of Weber would have strengthened the Union's position, a contrary result. The "war" remarks sums up the Company's view of its relations with the Union, and can be fairly said to cover the entire period involved here as far or further back than February 1982.

The Respondent's refusal to reinstate Weber, as ordered by the arbitrator, viewed in the context of his having sought assistance and his vigorous exercise of his protected concerted rights, coupled with the "war" remark by the Respondent's agent Richard K. Jones is sufficient circumstantial evidence to meet the General Counsel's burden of proving by a preponderance of the evidence that the Respondent was motivated by union animus and a desire to punish Weber for the exercise of his protected concerted rights. The Respondent was determined to get the upper hand over the Union and it did not intend to let the Union score a victory by securing Weber's reinstatement.

Under the *Wright Line* doctrine, to avoid being fully guilty of an unfair labor practice at this stage, the Respondent must show by a preponderance of the evidence that there was business justification for refusing to reinstate Weber and that he would have been refused reinstatement in any event. I find that it has failed to meet this burden.

The Respondent claims that its motives were proper. Without making any attempt to deny the remarks attributed to Jones, the Respondent argues that the reason for refusing to reinstate Weber was the latter's "theft or fraud relating to the Company." Denial of reinstatement, says the Respondent, was necessary to deter Weber and other employees from committing similar frauds in the future, and was not a punishment disproportionate to that imposed upon other employees who, in the past, had fraudulently obtained unemployment compensation benefits. Finally, to buttress its defense, the Respondent notes that it has no previous record of committing unfair labor practices.

As proof that its refusal to reinstate Weber was based on his having fraudulently obtained unemployment compensation benefits, the Respondent points to the letter denying Weber reinstatement, written by Richard K. Jones to Weber on April 15, 1982, in which Jones said that

Weber had committed a fraud upon the unemployment compensation office and upon Vilter, "whose account may be penalized based on an adverse impact upon its experience rating." Jones went on to characterize Weber's conduct as a violation of the Company's rules dealing with falsification of employment records and theft or fraud relating to the Company. Jones noted that he had no alternative but to consider Weber's "actions as falsification of employment record," because Weber had failed to disclose by March 5, 1982, who had employed him during the periods when he claimed to be unemployed.

I find, however, that the letter is no more than an artfully drafted coverup of the Respondent's actual motives. The purported conclusion to be drawn from it, that there was business justification for the Respondent refusing to reinstate Weber, is faulty, because it is based on representations in the letter which are at best half-truths, if not deliberate misstatements.

The first inaccurate statement made by Jones in his letter is his assertion that Vilter's "account may be penalized based upon an adverse impact upon its experience rating." That statement, while it could have been true before it was determined by the State of Wisconsin that Weber had received unemployment benefits to which he was not entitled, was untrue at the time it was made, and Jones knew it was untrue.

The parties stipulated at trial that:

> An employer's account is automatically made whole for benefits charged against it, which the UC Agency determines the employee was not eligible to receive. This payment is made to the employer's account from the general fund as soon as such determination has been made by the Unemployment Compensation Department.

After the stipulation was admitted into evidence, Jones acknowledged in his testimony that he was aware of the procedure described in the stipulation prior to the time Weber was fired in August 1981.

The determination that Weber had received benefits to which he was not entitled was made by Job Service Division on or before February 16, 1982, the mailing date of the UC-16 form recording the determination, a copy of which was received by Jones. The effect of the determination by Job Service Division was to automatically make Vilter's unemployment account whole. The restoration of Vilter's account was not contingent upon collection of the overpayment from Weber; indeed, an employer is not a party to Job Service Division's collection procedures. Thus, when Jones wrote his letter of April 15, 1982, to Weber, he knew that Vilter's unemployment account had been made whole in February 1982, and he deliberately misrepresented that Vilter might be penalized financially, when he knew that was not the case.

In addition to misrepresenting the possibility of an adverse financial impact upon Vilter as a result of Weber's actions, Jones exaggerated the significance of Weber's alleged failure to provide the name of his employer at the time he said he was unemployed. While it appears to be true that Weber did not furnish that particular information by March 5, 1982, as demanded by Jones in a letter dated March 3, 1982,[10] the information was irrelevant and neither wanted nor needed by Vilter. In fact, Vilter's main concern, as evidenced by Jones in telephone conversations with Weber in February 1982, and a letter dated March 1, 1982, addressed to Weber, was in obtaining confirmation that Weber had repaid the overpayment of $572 in unemployment benefits which he had received. No mention was made in the letter of March 1, 1982, of any requirement that Weber provide the name of the interim employer, and, so far as this record reflects, Jones did not ask for this information in any of the telephone conversations which he had with Weber in February. The demand first appears in the letter of March 3, 1982, which otherwise is merely a recapitulation of the March 1 letter, and seems to serve no new purpose.

Not only did Jones not appear to be particularly interested in the identity of the employer, as the request for it was obviously no more than an afterthought included in an otherwise superfluous letter, the information was of no use to Jones or Vilter. The determination that Weber had been overpaid unemployment benefits had been made by the Job Service Division before Vilter was notified of the determination in February. There was nothing left for Vilter to do in establishing the overpayment or the reasons for it. As testified by a representative of Job Service Division, the employer (in this case, Vilter) is not considered a party of interest in an overpayment issue. Neither was the information needed by Vilter to protect its financial interests. Its account was made whole as soon as the overpayment determination was made.

In short, the failure of Weber to disclose the name of his employer in September 1981, related to no issue of material concern to Vilter, even assuming that Jones made a timely request for it and was unable to obtain the name through any other source (neither of which are established in this record). Since Vilter had no need of the information, the request for it was no more than a ruse intended to give the appearance of enhancing Vilter's case for refusing reinstatement.

The charge by Jones contained in his letter of April 15, 1982, that Weber violated the Company's "D" type rules dealing with falsification of employment records is nothing more than a red herring introduced to further confuse the issues and divert attention from Vilter's real motives. The particular "D" rule to which Jones referred states, in pertinent part, that "[a]n employee shall not falsify employment records, job time tickets or production records." Weber's actions may have violated another "D" rule (theft or fraud . . . relating to the Company), as also charged by Jones, but they did not amount to a falsification of employment records. Jones was not an employee of Vilter at the time he submitted false information concerning current employment to Job Service Division, and he did not falsify any employment

[10] It is doubtful that the letter was even delivered to Weber by March 5, 1982, but, even if it were, Weber was not given a reasonable time in which to reply.

records which belonged to or were submitted to Vilter, in which Vilter could have had any proprietary interest.

Finally, and perhaps most damaging to the Respondent's defense that it did not act for any reason inconsistent with the Act, there is a complete failure of proof that Weber would have been refused reinstatement in any event, the other half of Respondent's burden of proof under *Wright Line*. In fact, the General Counsel has proven by a preponderance of the evidence that Vilter's treatment of Weber was disproportionate to its treatment of others who obtained unemployment benefits by fraud.

The principal reference in the record to a similar case is to the case of Joseph Bray. Bray, it appears, was improperly paid unemployment benefits for a week in February 1981, when he actually had been recalled from layoff. Over the next 9 months, Vilter officials, including Jones, made repeated unsuccessful demands that Bray repay the overpayment. Finally, by letter of December 23, 1981, Cyrilla C. Haler, Vilter's personnel manager, sent Bray a letter stating that unless he brought in a receipt showing repayment by January 4, 1982, "disciplinary action will be forthcoming." When Bray failed to comply with the ultimatum, his employment was terminated effective January 12, 1982; but, even then, termination need not have been final, since after a grievance was filed, Vilter agreed to reinstate Bray if proof of payment was delivered by the Union by February 5, 1982 (Richard K. Jones acted for Vilter in the grievance proceeding). According to Jones' letter to the Union's president, dated February 10, 1982, the grievance was denied ultimately because proof of payment was still not provided. Thus, in Bray's case, final job termination was imposed only after a period of 10 months during which Bray was repeatedly offered but refused the opportunity to avoid termination by repaying the overpayment.

Further mention is made in the record of the fate of several other employees who also received unemployment benefits to which they were not entitled, but few details are provided. According to the testimony of Robert Ziegler, the Union's president, in July 1982 he asked Jones why several foundry employees were not terminated for claiming unemployment benefits while they were working. Jones replied, "Those guys are stupid." Jones, for his part, denied calling anyone stupid, but acknowledged an employee named Marvel Tyler, and another employee, apparently named Skale (phonetic), were not terminated. Jones said that in the case of Marvel Tyler, which he characterized as identical to Weber's case, Tyler was given eight disciplinary points and a 1-week layoff. In the other case, that of the employee named "Skale," who had received 1 week's employment compensation to which he was not entitled, Jones said he told the employee to "take that immediately back to the Unemployment Compensation Office and we'll forget it."

The difference in treatment is obvious. The penalty imposed upon Weber, refusal of reinstatement, which is the equivalent of termination, was disproportionate to that imposed by the Respondent on other employees for similar alleged misconduct. In the Bray case, the employee was terminated only after he refused to comply with repeated demands made over a 10-month period to repay the overpayment of unemployment compensation benefits which he had received. Not only was Bray not terminated until he failed to meet repeated demands for repayment, he was offered reinstatement after being terminated if he would make the repayment, and it was only after he still refused to furnish proof of repayment, that his termination became final. Termination, it seems, was never even considered, and certainly not imposed, in the other two cases, one of which was described by Richard K. Jones, the Respondent's manager of human resources, as identical to Weber's case. Jones, himself, admitted that he told one employee that he would "forget it" if the employees returned an improperly drawn unemployment compensation check.

By comparison, Weber was refused reinstatement even though he had repaid his overpayment of unemployment benefits by February 19, 1982 (as reflected on the UC-315 form, bearing that mailing date), almost 2 months prior to Jones' letter refusing him reinstatement. If there is one thread of consistency in the examples cited by the Respondent, it is that the Respondent's primary concern in cases of this type was making certain that any overpayment of unemployment benefits was repaid, and where there was repayment, except in Weber's case, the Respondent did not choose to impose termination.[11] And, in Weber's case, too, Jones' concern in February and March 1982, was primarily in obtaining proof of repayment. Yet, for reasons which cannot be explained by the Respondent's treatment of employees in similar or even identical cases, in April 1982, Jones refused Weber reinstatement despite repayment.[12]

I reject as superficial and unconvincing the Respondent's contention that Weber's case is distinguishable because he did not act out of impulse (he repeated his action on four separate occasions), while Bray, who submitted only a single false claim, presumably did.[13] While the difference in the number of weeks involved may be true, it is inconsequential. The burden of proof in showing that Weber would have been terminated in any event is upon the Respondent. The mere fact that Weber received 4 weeks of unemployment compensation to which he was not entitled, while Bray received only one, standing alone, proves nothing. There is no rational basis in this record for differentiating on the basis of 1 and 4 weeks in deciding whose misconduct was worse. The fact that Bray may have received unemployment com-

[11] It is worth noting that the Respondent's plant rules give it the option of imposing for type "D" rules violations either disciplinary layoff or discharge. Imposition of the latter punishment is not required.

[12] The Respondent makes no claim in its brief that it did not know as of April 15, 1982, that repayment had been made. Indeed, the record clearly shows that the Respondent, through its attorney, had possession not later than March 12, 1982, of a copy of the UC-315 form, bearing the mailing date February 19, 1982, showing repayment had been made. In any event, Jones' April 15, 1982 letter adroitly makes no mention of failure to provide proof of repayment as grounds for refusing reinstatement. Instead, refusal of reinstatement is predicated upon the alleged failure by Weber to provide the name of his interim employer, a bit of information, as previously discussed, which was irrelevant to any concern of the Respondent.

[13] The Respondent makes this distinction in both its brief and in a statement of position, dated September 10, 1982, submitted to Region 30 of the National Labor Relations Board.

pensation for 1 week is not evidence that he acted out of impulse, whereas Weber did not, and, therefore, he is less guilty than Weber. In fact, no evidence was presented by the Respondent from which it can be concluded that Bray, or either of the other two employees who claimed unemployment benefits to which they were not entitled, acted by mistake, accident, oversight, or out of impulse, or as a result of any other circumstance which might mitigate their misconduct. Considering the Respondent's failure to meet its burden of proof by showing that the misconduct of other employees who were not discharged, or were offered the opportunity to avoid discharge, was less serious than that of Weber, I find no necessity to speculate as to factors which might also mitigate Weber's misconduct. The point is, the Respondent has failed to meet its burden of proving that there was justifiable reason for the disproportionately severe penalty which it imposed upon Weber, compared to the lesser penalties which it imposed upon other employees who committed identical or similar misconduct.

In summary, the Respondent has failed to prove by a preponderance of the evidence that it had business justification for refusing to reinstate Weber and that, he would have been refused reinstatement for the same misconduct in any event. The Respondent suffered no financial loss attributable directly or indirectly to Weber's misconduct. The penalty which it imposed upon Weber was disproportionately severe compared to the penalities imposed upon other employees for similar or identical misconduct, and the Respondent was unable to make any believable showing justifying the disparity. Therefore, the Respondent has failed to show that Weber would have been terminated (or refused reinstatement) in any event. Since it kept in its employ other employees whose misconduct was similar or identical, and not demonstrably less serious, the Respondent's claim that it refused to reinstate Weber to deter him and others from committing similar frauds in the future is patently lacking in substance and merit. And, finally, in light of all this, the fact, if true, that it may have no previous record of committing unfair labor practices is simply insufficient to carry the Respondent's burden of proof under *Wright Line*, or to discredit the proof produced by the General Counsel.

CONCLUSIONS OF LAW

1. Vilter Manufacturing Corporation, the Respondent, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all times material, United Steelworkers of America, Local Union No. 1018, AFL-CIO was a labor organization within the meaning of Section 2(5) of the Act, and was the exclusive bargaining representative for purposes of collective bargaining within the meaning of Section 9(b) of the Act of all of the Respondent's production and maintenance employees, except those employees specifically excluded from the bargaining unit.

3. The Respondent and the Union were bound by the terms and conditions of a collective-bargaining agreement covering the period ending August 31, 1981, which provided, in part, that if a grievance is not settled in conformity with the grievance procedure set out in the agreement, it shall be referred to arbitration before an impartial arbitrator whose decision shall be final and binding upon the parties.

4. About August 31, 1982, Jon Weber, a member of the bargaining unit, was discharged by the Respondent. A grievance filed by the Union on behalf of Weber over the discharge was not settled and was referred to binding arbitration, in accordance with the collective-bargaining agreement. A hearing on the matter was held before the arbitrator on February 8, 1982. In an award, dated April 9, 1982, the arbitrator ordered that Weber's termination be set aside and that he be reinstated to his former employment within 10 days, without loss of seniority, but without backpay.

5. On April 15, 1982, the Respondent refused, and has continued to refuse at all times since then, to reinstate Weber to his former employment in accordance with the arbitrator's award, which is binding upon the Respondent.

6. The Respondent refused to reinstate Weber, as stated above, because Weber joined, supported, or assisted the Union, and engaged in concerted activities for the purposes of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

7. By its refusal to reinstate Weber, for the reason stated, the Respondent committed unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

8. About August 20, 1982, or shortly thereafter, the Respondent, by its agent, Richard Jones, manager of human resources, committed an unfair labor practice by expressing the threat to union members that if the Union wanted a war it would get it, or words to that effect, because the Union had engaged in lawful actions which displeased the Respondent, in violation of Section 8(a)(1) and (3) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in unfair labor practices, I find it appropriate to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having committed an unfair labor practice by refusing to reinstate the employment of its former employee, Jon Weber, in accordance with an arbitrator's award dated April 9, 1982, which was binding upon the Respondent, shall offer Jon Weber full and immediate reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any rights or privileges, and shall make him whole for any loss of earnings which he may have sustained as a result of the Respondent's failure to reinstate him to his former position in accordance with the arbitrator's award. Backpay shall be computed from April 19, 1982, in accordance

with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977); see generally *Isis Plumbing Co.*, 138 NLRB 716, 717–721 (1962).

[Recommended Order omitted from publication.]